APPEAL NO. 032726
FILED DECEMBER 3, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 9, 2003. The issues at the CCH were: (1) maximum medical improvement (MMI); (2) impairment rating (IR); and (3) disability after January 30, 2003. The hearing officer determined that the designated doctor's certification "is divested of its presumptive weight"; that MMI and IR cannot be determined; that a second designated doctor is to be appointed to determine MMI and the IR; and that the respondent (claimant) had disability from January 30, 2003, through the date of the CCH.

The appellant (carrier) appealed, contending: (1) that the hearing officer acted "arbitrarily" in finding that the designated doctor's report was not entitled to presumptive weight (thereby MMI and IR could not be determined); (2) that the hearing officer's conduct of the CCH and evidentiary rulings were "egregious"; and (3) that the disability determination was incorrect. The file does not contain a response from the claimant.

DECISION

Affirmed.

At the outset, we note that most the CCH dealt with matters extraneous to the merits of the case. The parties stipulated that the claimant sustained a compensable injury on _____, when the claimant's right hand and arm were caught in the wheel well of a vehicle when it rolled backward. The claimant saw a number of doctors. Dr. G performed a right wrist orthroscopy on March 28, 2002. There were apparently complications and Dr. S became the treating doctor and performed a second surgery ("involving a thumb fusion and metal plate and bone graft") on August 19, 2002. In a report dated January 22, 2003, Dr. S outlined his proposed treatment, which included possible additional surgery after the fusion (second surgery) healed.

The parties stipulated that Dr. T was the Texas Workers' Compensation Commission (Commission)-selected designated doctor. Dr. T, in a Report of Medical Evaluation (TWCC-69) and narrative dated January 30, 2003, certified MMI on that date with an 8% IR based on loss of range of motion under the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000). The claimant was also examined by a carrier required medical examination (RME) doctor who, in a report dated February 12, 2003, indicated, in effect, that the claimant was not at MMI, that additional surgery was needed, and that an MRI should be done. (An MRI report in evidence is dated October 24, 2001.) Reports of Dr. S and the RME doctor were sent to Dr. T with a request for clarification. Dr. T, in a response dated April 17, 2003, discussed the RME report as containing "multiple errors in his

description of events and findings" and concluded that additional surgery would be of no benefit. The claimant had a third surgery on April 28, 2003, which included removal of one of the MP joint fusion screws. The claimant testified that his condition has "dramatically" improved since the surgery. The Commission again requested clarification from Dr. T based on the third surgery. Dr. T responded by letter dated June 23, 2003, that the surgery did not alter his opinion of MMI and IR and commented that the surgeries are not related to the compensable injury. Two record review doctors in July and August 2003 essentially agree with Dr. T. Dr. S has apparently left the area and is unavailable. The parties appear to agree that the claimant reached statutory MMI (*see* Section 401.011(30)(B)) on September 17, 2003.

Much of the CCH was taken up with hearsay regarding animosity between Dr. T and Dr. S including some kind of letter (not in evidence) of some kind of lawsuit between the doctors. This included the (improper) admission into evidence as Hearing Officer's Exhibit No. 4 of a partially redacted decision and order of another hearing officer which names Dr. T and Dr. S and discusses their difference of opinion in a completely unrelated case. The carrier's attorney, in the appeal states that he "objected strenuously to [the allegations of animosity between Dr. T and Dr. S] as being immaterial and hearsay within hearsay." Our review of the record indicates that the carrier only objected upon redirect examination of the claimant after the claimant testified without objection about Dr. T's examination and referenced what had been said at the benefit review conference. The hearing officer overruled the objection saying the door had already been opened. The carrier then proceeded in a vigorous recross-examination of the claimant about what doctor said what about the other. The carrier also objected to Hearing Officer's Exhibit No. 4.

We review a hearing officer's evidentiary rulings on an abuse-of-discretion standard. Texas Workers' Compensation Commission Appeal No. 92165, decided June 5, 1992. To obtain reversal of a judgment based upon the hearing officer's abuse of discretion in admitting or excluding evidence, an appellant must first show that the admission was in fact an abuse of discretion, and, also, that the error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. *See* Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ). We perceive no abuse of discretion by the hearing officer in his evidentiary ruling.

The hearing officer also determined that the great weight of other medical evidence was contrary to the designated doctor's certification and consisted of:

(1) the third surgery, which addressed a specific new problem associated with the compensable injury and which took place prior to statutory [MMI];

(2) [Dr. T's] refusal to re-examine the Claimant after the third surgery; and

(3) [Dr. T's] refusal to accept the full extent of the compensable injury, specifically, the tendon subluxation and fusion screw problem.

While we adhere to the principles that a designated doctor's report should not be rejected absent a substantial basis to do so and that a hearing officer should detail the evidence why the great weight of other medical evidence is contrary to the designated doctor's report, we conclude that the hearing officer has done so and his determinations are sufficiently supported by the evidence.

The carrier, at the CCH, and on appeal, argued that Dr. T should be allowed to respond to the allegations made in hearsay testimony. The CCH, in this case, was to decide the claimant's MMI and IR, not engage in accusations and counter accusations. While Dr. T's (and to an extent Dr. S's) credibility was brought into question, the hearing officer gave his reasons for his determinations and those reasons are supported by the evidence.

On the issue of disability the hearing officer's determination is supported by medical evidence of the April 28, 2003, third surgery for removal of the fusion screws used in the second surgery for the compensable injury and the claimant's testimony regarding the results of that surgery. (We note that the carrier is raising an extent-of-injury issue but the hearing officer, as the finder of fact, could clearly determine that the third surgery related to the compensable injury.) Under the circumstances the appointment of a second designated doctor who is advised of the extent of the compensable injury is appropriate and does not constitute reversible error.

The hearing officer's decision and order are affirmed.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

_____
Edward Vilano
Appeals Judge